**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**CEDAR RAPIDS DIVISION**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>BRION DODD JOHNSON,<br>Defendant. | No. CR04-12-LRR<br>**REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS** |

## *I. INTRODUCTION*

On February 5, 2004, Brion Dodd Johnson ("Johnson") was charged in a two-count Indictment returned by the United States Grand Jury for the Northern District of Iowa. In Count 1, Johnson was charged with possession and attempted possession of visual depictions of minors engaged in sexually explicit conduct. In Count 2, Johnson was charged with receiving and attempting to receive visual depictions of minors engaged in sexually explicit conduct.

On March 1, 2004, Johnson filed a motion to suppress (Doc. No. 14) and a supporting brief (Doc. No. 16), asking the court to suppress certain evidence seized during a search of his apartment in Marion, Iowa, on June 23, 2003. The search was pursuant to an Iowa state court warrant issued by an Iowa magistrate. The plaintiff (the "Government") filed its resistance to the motion, together with a supporting brief, on March 10, 2004. (Doc. No. 21)

The motion has been assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended

disposition. Accordingly, the court held a hearing on the motion on March 16, 2004, in Cedar Rapids, Iowa. Special Assistant United States Attorney Teresa Baumann appeared on behalf of the Government. Johnson appeared in person with his attorney, Wallace L. Taylor.

Detective Lance Miller of the Marion Police Department was called as a witness for the defendant. Government Exhibit 1, containing various state search warrant documents, was admitted into evidence.

The court finds the motion has been fully submitted and is ready for consideration.

## *II. FACTUAL BACKGROUND*

On June 23, 2003, Detective Lance Miller submitted an affidavit to a state magistrate in support of an application for a search warrant. According to Detective Miller, a confidential informant ("CI") had contacted the Marion Police Department that day with information implicating Johnson in the receipt and possession of child pornography. The CI stated she was afraid of Johnson because of his "terrible temper," and because he had been convicted of murder in Arkansas. She decided to assist law enforcement because she was concerned for a juvenile female who lived in an apartment adjacent to Johnson's apartment. The CI knew Johnson had a key to the juvenile's apartment, and he was supposed to check on the juvenile while the juvenile's mother was working the overnight shift at Wal-Mart. The CI stated she also wanted to help law enforcement because she "was disgusted with the child pornography materials that Johnson kept within his residence," and because she did not approve of Johnson's use of marijuana.

The CI provided law enforcement with three CD-ROM discs which she stated belonged to Johnson. She stated she had received them from Johnson's roommate, Tony Herman, who had given them to the CI because he also was troubled by Johnson's actions.

According to the CI, Herman was afraid of Johnson and did not want to be involved directly with law enforcement. The CI stated she had examined the contents of the discs recently, and had determined that they contained pornographic images of children. Detective Miller confirmed that the discs contained numerous still images and movies of children engaged in sex acts. Two of the discs were labeled with the name 'Brion," and the third was labeled as "save files."

The CI stated Johnson would connect to the internet via a cable that ran from his apartment window, along the outside of the apartment building, to the apartment of the female juvenile's mother, who was an internet subscriber. According to the CI, there were three computers in Johnson's apartment, and they all were networked together. The CI stated Johnson had software on his computer to wipe his hard drive instantly should law enforcement attempt to recover data from the computer. Detective Miller was aware from his training and experience that this is a common safeguard utilized by persons in possession of child pornography.

The CI stated she had been in Johnson's apartment after June 14, 2003, and that Johnson had a large amount of computer hardware and numerous data discs throughout the apartment. She drew a floor plan of the apartment for the officers. She also told the officers she had seen a container in the apartment that Johnson used to store marijuana and a pipe.

The CI told the officers that Johnson's computer screen name was "BigbrionJ," and she believed he had an account under that name with Yahoo. A detective checked with Yahoo, and found a profile for "BigbrionJ," including a picture that matched a photograph of the defendant provided to the officers by the CI. The officers also observed that a cable ran on the outside of the apartment building from Johnson's apartment to his neighbor's apartment. They determined that the neighbor worked the overnight shift at Wal-Mart.

Officers found vehicles parked in the apartment building parking lot that were registered to Johnson and to the neighbor. A detective posing as a utility employee checking on a power outage confirmed Johnson's address by speaking personally with Johnson. The detective also confirmed the neighbor's address by speaking with her on the telephone. Officers ran a criminal history on Johnson and determined that he had arrests for narcotics distribution, narcotics possession, possession of drug paraphernalia, burglary, first degree murder, and domestic assault.

Detective Miller stated in his affidavit that from his training, he knows data on a computer can remain there long after it has been erased, and sometimes can be recovered by law enforcement.

According to an endorsement on the search warrant application, the CI's information appeared to be reliable for the reasons indicated in Detective Miller's affidavit,[1] and because of the detailed nature of the CI's information "which is corroborated in part by the examination of the CDs and criminal history check of Johnson."

During his testimony at the suppression hearing, Detective Miller denied knowledge of any animosity between the CI and Johnson. He admitted he did not interview either Johnson's roommate, Herman, or Johnson's neighbor before obtaining the search warrant, but stated he made that decision because he did not want to lose the element of surprise before executing the search warrant.

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[1] "Because of the seriousness of the alleged crime, the willingness of the informant to seek out law enforcement, the accuracy of the information concerning Phillip's employment, the three CD-rom discs provided to law enforcement containing child pornography, the accuracy of the CI's information concerning Johnson's previous criminal history, and the hardware cable view by law enforcement running from Johnson's apartment to Phillip's apartment."

### *III. IS THE DEFENDANT ENTITLED TO A FRANKS HEARING?*

In Johnson's motion to suppress, he argues that in Detective Miller's search warrant application, he intentionally, or with reckless disregard for the truth, presented false information to the state magistrate. He further argues that without this false information, the application did not contain probable cause to support the issuance of the warrant.

The first issue before the court is whether the defendant has made the requisite showing for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Under *Franks*, the court is required to hold a hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. at 155-56, 98 S. Ct. at 2676. Further,

> [i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156, 98 S. Ct. at 2676. The same principles are true for material the defendant alleges was omitted from (rather than included in) a warrant affidavit.

Under *Franks*, before a defendant is entitled to a hearing, he must make a *substantial* preliminary showing that relevant information was omitted from the affidavit either intentionally or with reckless disregard for the truth. The substantiality requirement is not easily met. *See United States v. Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995); *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir. 1987) When no proof is offered that an affiant deliberately lied or recklessly disregarded the truth, a *Franks* hearing is not

required. *U.S. v. Moore*, 129 F.3d 989, 992 (8th Cir. 1997). "A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit of a witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing." *Id.* (citing *Franks*, 438 U.S. at 171); *see United States v. Ketzeback*, ___ F.3d ___, 2004 WL 369037 (8th Cir., Mar. 1, 2004);[2] *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986). The defendant also must show "that the allegedly false statement was necessary to a finding of probable cause or that the alleged omission would have made it impossible to find probable cause." *United States v. Mathison*, 157 F.3d 541, 548 (8th Cir. 1998).

Johnson offers two affidavits in support of his request for a *Franks* hearing. The following is quoted from an affidavit of Johnson's roommate, Tony Herman:

> I, Tony Herman, being, first duly sworn on oath, state that I currently live at 300 E. Butler St., Manchester, Iowa. I am 33 years old.
>
> On June 23, 2003, I shared an apartment with Brion Johnson at 1500 7th Ave., Marion, Iowa. We moved to that address in January or February, 2003. During the time Brion and I lived there, Evonne Huston had a relationship with Brion. Evonne was at the apartment most of the time.

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[2] In *Ketzeback*, the court held:

> A facially valid warrant affidavit is constitutionally infirm if the defendant establishes the affidavit included deliberate or reckless falsehoods that, when redacted, render the affidavit's factual allegations insufficient to support a finding of probable cause. *Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Omissions likewise can vitiate a warrant if the defendant proves "first that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and, second, that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *United States v. Allen,* 297 F.3d 790, 795 (8th Cir. 2002).

*Ketzeback*, ___ F.3d at ___, 2004 WL 369037, at *2.

> About a month before June 23, 2003, Evonne was told by Brion that she had to move out. This made Evonne upset.
>
> During the time that Evonne was living at 1500 7th Ave., she used Brion's computer a great deal. She also used my computer. She had access to all the computers in the apartment and she knew Brion's password.
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> I am aware that Evonne Huston told police on June 23, 2003, that she was in fear of Brion. But I know that shortly after the search, Evonne stayed with Brion, so she couldn't have been afraid of him.
>
> I am also aware that Evonne took some computer CD's to the police on June 23, 2003, and that these discs apparently contained child pornography. I understand that Evonne told the police I gave the CD's to her. I did not give Evonne any CD's.
>
> Prior to the search on June 23, 2003, no police officer attempted to contact me to confirm what Evonne had told them.

The following is quoted from an affidavit of Jody Achey, an acquaintance of Johnson's and the CI's:

> I, Jody Achey, being first duly sworn on oath, state that I am 35 years old and a student at Hamilton College in Cedar Rapids. I am acquainted with Brion Johnson and Evonne Huston.
>
> I met Brion in May of 2003, and we started dating in early June of 2003. I would visit Brion at his apartment at 1500 7th Ave. in Marion. During this time, even though Brion had broken off his relationship with Evonne, she would continue to come to his apartment uninvited and use his computer. I recall one time when I came to Brion's apartment, Evonne stormed out of the door, screaming.
>
> When I would come to Brian's apartment, Evonne would be very angry about my being there. She made

> comments to the effect that she could break up with Brion, but he could not break up with her. Evonne was very rude to me and called me profane names. Evonne would come into the apartment on a regular basis uninvited. Brion would tell her to leave, but she refused to do so. My observation was that Evonne was a very controlling person. For example, Evonne would tell Brion that my son and I had no right to be there in the apartment, and that Brion should tell us to leave. She told me she was Brion's girlfriend and I should leave. This was after Brion had made it clear to her that their relationship was over.
>
> I saw Evonne using Brion's computer every time that she was in the apartment. I know that Evonne had complete access to Brion's computer and knew his password.

These affidavits outline a possible defense to the charges against Johnson, but they do little to support a request for a *Franks* hearing. Tony Herman takes issue with the credibility of the CI. He states that about a month before the search warrant, the CI became upset with Johnson when Johnson told her to move out. According to Herman, the CI had access to and used Johnson's computers, and she knew Johnson's password. Herman disputes that the CI was afraid of Johnson, and also disputes that he gave any of Johnson's discs to the CI.

Herman's affidavit does not come close to making a "substantial showing" that Detective Miller knowingly included false information in his application for the search warrant "with the intent to mislead or in reckless disregard of the omissions' misleading effect." *Ketzeback*, ___ F.3d at ___, 2004 WL 369037, at *2. Nothing in Herman's affidavit supports a claim that Detective Miller knew any of the information provided by the CI was false or misleading. Although Herman states no officer ever contacted him to corroborate the CI's information, this was entirely understandable because Detective Miller had been told that Herman was afraid of Johnson and did not want to cooperate, and

Detective Miller did not want to lose the element of surprise before executing the search warrant. In any event, the court can find no legal authority that would support the imposition of a duty on law enforcement officers to continue their investigations after they already have gathered what they believe to be adequate evidence to provide probable cause for the issuance of a warrant. Here, Detective Miller had an informant with personal knowledge of the suspect who gave detailed information about the suspect and his activities, and who provided him with physical evidence implicating the suspect in criminal activity. He and his fellow officers then investigated much of the information provided by the informant, and everything they checked out was corroborated, including Johnson's screen name, the cable from his apartment to his neighbor's apartment, and his extensive criminal record.

In her affidavit, Jody Achey states she became Johnson's girlfriend after Johnson broke up with the CI. Achey states the CI would come to Johnson's apartment uninvited, would use Johnson's computer, and generally would act rude and unstable. She also stated the CI knew Johnson's password. Again, nothing in this affidavit even gives rise to an implication that Detective Miller knew any of the information provided by the CI was false or misleading.

Johnson has failed to make the "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676. The affidavit submitted in support of the warrant provided probable cause to support the issuance of the warrant under the standards set out by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983); *see also*, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (*i.e.*, in most circumstances, even if a warrant is

invalid, if officers rely on the search warrant reasonably and in good faith, then evidence obtained from the search should not be suppressed.) Therefore, the defendant's request for a *Franks* hearing, and his motion to suppress, should be **denied**.

## *IV. CONCLUSION*

For the reasons discussed above, **IT IS RECOMMENDED**, unless the defendant files objections to this Report and Recommendation **by March 22, 2004**,[3] that the motion to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections by March 22, 2004. Any response to the objections must be served and filed by March 26, 2004.

**If either party objects to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.**

**IT IS SO ORDERED.**

**DATED** this 16th day of March, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3]This is a shorter time period than normally allowed for objections, and the parties are cautioned to file their objections timely.